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In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

AMERICAN HOSPITAL ASSOCIATION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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The court of appeals has affirmed a sweeping nationwide injunction that permanently bars the Secretary from "any further implementation" of the regulations designed to protect handicapped newborn infants against the discriminatory withholding of medical care in federally assisted hospital programs and from "undertaking any other actions" pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, with respect to the treatment of such infants. That decision is wrong and plainly warrants review by this Court. Respondents' attempts to minimize the effect of the decision below and to justify an implied exception from the broad terms of Section 504 for the denial of medical care even when based solely on the infant's handicap are without merit.

1. Respondents American Medical Association, et al. (AMA) make little effort to defend the broad holding of the court of appeals that Section 504 has no application whatever to a hospital's withholding of nourishment or treatment from a newborn infant solely because of his handicap. Nor does the AMA make

any serious effort to rebut our submission (Pet. 12-25) that the text, legislative history, and administrative interpretation of Section 504 firmly support application of that Section to such conduct. Respondents American Hospital Association, et al. (AHA) at least do address these issues, but to no avail.

a. The AHA does not dispute that the infants who are protected by the regulations invalidated by the court of appeals are "handicapped" within the meaning of Section 504. See Pet. 13-14. The AHA instead relies (Br. in Opp. 21-22, 24-25) on the language in Section 504 that prohibits discrimination against a handicapped individual only if he is "otherwise qualified." The AHA does not suggest that the infants protected by the regulations fail to meet any legitimate qualifications imposed by a program of federally assisted health care; indeed, it appears to concede that a person ordinarily need not possess any special qualifications to receive nourishment or beneficial treatment under such a program. But the AHA argues that because there are no special qualifications, an impaired newborn infant in need of treatment by a federally assisted hospital program cannot be regarded as "otherwise qualified" to receive that treatment. This argument makes no sense. It would have the perverse effect of exempting from the coverage of Section 504 *all* federally assisted programs and activities that are open to the public at large—the very ones in which there would be *no* programmatic justification for excluding handicapped persons from full participation. Compare *Southeastern Community College* v. *Davis*, 442 U.S. 397, 407 (1979).

b. Not surprisingly, the AHA offers no support in the legislative history for such a loophole. The AHA does argue (Br. in Opp. 22-23) that Section 504 is inapplicable in this setting because the Rehabilitation Act was designed to prohibit discrimination in vocational, employment, educational and similar programs, but not health services. This submission ignores the Senate Report on the 1974 Amendments, which specifically states that Section 504 applies to federal assistance in relation to "health services" (S. Rep. 93-1297, 93d Cong., 2d Sess. 38 (1974)). Moreover, in *Alexander* v. *Choate*, No. 83-727 (Jan. 9, 1985), this Court considered the effect of Section 504 on a State's furnishing of services under a state Medicaid program, without any intimation that Section 504 does not even apply to the furnishing of health services.

Although the AMA does not deny the application of Section 504 to health services to this extent, it does maintain (Br. in Opp. 20-24) that Section 504 should not apply to a hospital's "decision not to treat in an individual case" (Br. in Opp. 20). This argument flies in the face of the statutory language, which provides that "[n]o otherwise qualified *individual* * * * shall, solely by reason of *his* handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under" the federally assisted program or activity. 29 U.S.C. 794 (emphasis added). It would be of no solace to a handicapped individual who is denied treatment for his own particular condition to learn that the hospital does not have a broad policy of excluding handicapped persons generally.[1]

Finally, although the AHA objects (Br. in Opp. 26-27) to the parallel Judge Winter drew in his dissenting opinion below (Pet. App. 42a-45a) between a denial of medical treatment on the basis of race and such a denial on the basis of handicap (see also AMA Br. in Opp. 17 n.18), the AHA ignores the fact that this parallel is mandated by the text and legislative history of Section 504 itself, which unequivocally establish that it is patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* See Pet. 19. It is true, as the AHA notes (Br. in Opp. 27), that this Court has

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[1]The AMA's related argument (Br. in Opp. 18-19) that Section 504 is concerned only with "access" to federal programs is refuted by the language and legislative history of the provision. As quoted in the text, Section 504 bars the recipient not only from excluding a handicapped person from the program altogether, but also from denying a handicapped person the benefits of the program or subjecting him to discrimination under it. The latter prohibitions clearly extend to a hospital's denial of medical treatment or protection to a handicapped person solely because of his handicap where that person already is a patient and thus was not entirely denied "access" to the hospital. The legislative history — including the only report cited by the AMA (see S. Rep. 92-1135, 92d Cong., 2d Sess. 49, 77 (1972)) — supports this reading as well. See S. Rep. 93-48, 93d Cong., 1st Sess. 53, 80 (1973); S. Rep. 93-318, 93d Cong., 1st Sess. 50, 70 (1973). See also S. Rep. 93-1297, 93d Cong., 2d Sess. 39 (1974) (emphasis added) (Section 504 establishes a "broad government policy" that federally assisted programs "shall be *operated* without discrimination on the basis of handicap").

observed that "too facile an assimilation of Title VI law to § 504 must be resisted" (*Alexander* v. *Choate*, slip op. 5 n.7). But that observation was made in connection with the question whether Section 504 reaches conduct that has the *effect* of discriminating on the basis of handicap. This case, by contrast, involves instances of *intentional* discrimination on the basis of handicap: the withholding of medical treatment from an impaired newborn infant "because of," not "in spite of," his handicap. Compare *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979). There is no reason to believe that Congress intended anything other than a direct parallel between handicap and race as regards such intentional discrimination.[2]

c. The AHA also repeats (Br. in Opp. 27-29) the court of appeals' erroneous assertion (Pet. App. 18a-25a) that HHS's interpretation of Section 504 is not entitled to deference because its position has not been consistent. As we have explained (Pet. 22-24), the regulations first promulgated by the Secretary in 1977 made clear that Section 504 applies to treatment decisions under federally assisted programs for the furnishing of health services (see 45 C.F.R. 84.55(a); *id.* Pt. 84, App. A para. 36), and the Secretary took the position in 1980—three years before the promulgation of the regulations at issue here—that Section 504 applies in the very context addressed by the regulations. Thus,

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[2]The AMA's objection (Br. in Opp. 19, 21-23) that the Secretary's interpretation creates a body of "[Section] 504 federal malpractice law" is without merit. The Secretary has not purported to fashion duties or rules of medical practice for physicians or hospitals generally. In her implementation of Section 504, the Secretary accepts the standards and reasonable medical judgments of the profession, and insists only that handicapped persons be afforded "evenhanded treatment" (*Alexander* v. *Choate*, slip op. 16) in their application. Contrary to the AMA's suggestion that the Secretary "may not even have the advice of medical consultants" (Br. in Opp. 20), the guidelines that accompany the Section 504 regulations specifically state that "[t]he Department will obtain the assistance of a qualified medical consultant to evaluate the medical information (including medical records) obtained in the course of a preliminary inquiry or investigation" (Pet. App. 71a).

the AHA is flatly wrong in stating that HHS first took this position "beginning in 1982" (Br. in Opp. 28).[3]

2. The AMA seeks to avoid the application of Section 504 by focusing on other matters: the role of parents and the state-law origins of a hospital's duties. Neither of these factors excuses a hospital from complying with Section 504.

a. The AMA first points out (Br. in Opp. 15, 20-21) that parents are responsible in the first instance for making decisions regarding the treatment of their infant children. The AMA then states that the Secretary makes what it terms the "devastating concession" (*id.* at 16) that parental decisionmaking is outside the scope of Section 504 because parents are not recipients of federal financial assistance within the meaning of Section 504. From these premises, the AMA concludes that the Secretary cannot do indirectly (by enforcing Section 504 against hospitals) what she cannot do directly (regulate parental decisionmaking). There are numerous flaws in this reasoning.

That Section 504 does not reach parental decisionmaking is not a "devastating concession"; it is a self-evident proposition. But we fail to see what that has to do with the issues in this case. The Secretary has not attempted to impose duties on parents under Section 504. But hospitals, unlike parents, *are* the recipients of federal financial assistance for their programs and activities, and they accordingly *do* have a duty of nondiscrimination under Section 504.

Moreover, although the AMA discusses the issues presented primarily in the context of situations in which the parents withhold their consent to appropriate treatment, the regulations and

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[3]Contrary to the further misleading contention by the AMA and AHA (AMA Br. in Opp. 22 n.22; AHA Br. in Opp. 28), the Secretary in 1976 rejected only the view that Section 504 confers on institutionalized persons an *absolute* right to treatment. As we have explained (Pet. 23-24), the Secretary's decision on that issue did not address the distinct question of the application of Section 504 to discrimination in the *relative* treatment of handicapped and nonhandicapped persons. See Pet. 23-24.

interpretative guidelines also apply where parents give their consent but the hospital refuses to treat the infant solely because of his handicap. See 45 C.F.R. Pt. 84, App. C paras. (a)(1) and (4); Pet. App. 66a-67a. In the latter situation, the parents' role obviously cannot immunize the hospital's conduct from scrutiny under Section 504. The AMA does not argue otherwise. Yet the nationwide injunction affirmed by the court of appeals in this case permanently bars the Secretary from investigating or taking enforcement action in that setting (Pet. App. 51a-52a).

In any event, contrary to the AMA's contention, Section 504 is not rendered inapplicable (and a hospital is not relieved of all responsibilities under Section 504) in those instances in which the parents have withheld their consent to medically indicated treatment. This Court has recognized that the "state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979). See also *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Santosky* v. *Kramer*, 455 U.S. 745 (1982). The AMA likewise does not appear to question that a hospital may seek to override parental decisions when it determines that those decisions are not in the child's best interests. It is this independent responsibility of the *hospital* that is addressed by Section 504. Section 504 does not impose a new duty on a hospital; it simply requires that a hospital act in a nondiscriminatory manner in exercising its *existing* authority under state law to take appropriate steps in instances of medical neglect by parents, taking the same steps for a handicapped child as it would for a nonhandicapped child.

Nor, finally, does the enforcement of Section 504 in this manner result in the Secretary's accomplishing indirectly something she is barred from doing directly. Section 504 does not affirmatively prohibit the Secretary from taking steps that affect parental decisionmaking; it simply does not reach or address parents' decisions as such because parents are not recipients of federal financial assistance. Further, it is state law, not Section 504, that regulates and in appropriate circumstances overrides the parents' decisions. The hospital discharges its obligation under Section 504 by invoking state processes to protect a handicapped

child in the same manner as it would a nonhandicapped child. From that point, it is the state processes, not Section 504, that may affect parental decisionmaking.

b. The AMA also argues (Br. in Opp. 18-19) that the nondiscrimination obligation under Section 504 does not attach to a hospital's performance of its duty to take measures where parents refuse to consent, on the ground that the latter duty arises under state law. This argument wholly ignores the historical purpose of federal civil rights laws generally to ensure that powers conferred by state law are not exercised so as to discriminate on a ground that is prohibited by federal law. See U.S. Const. Amend. XIV (No State shall "deny to any person within its jurisdiction the equal protection of the laws."). The AMA's argument (Br. in Opp. 18-19) that this responsibility under state law is not part of the federally assisted "program or activity" therefore must fail. The obligation or authority of a hospital to take steps to protect a child who is medically neglected by his parents attaches because the hospital has taken the child into its care for treatment under the federally assisted program or activity, and the invocation of state processes is intended to override parental decisions that operate against the child's interests and thereby to facilitate the fulfillment of the objectives of the program or activity insofar as it affects the child. The hospital's actions thus are an integral part of its federally assisted functions. Indeed, there presumably are many aspects of the operations of most recipients of federal funds that are independently regulated by state law, but this has never been thought to exempt those aspects from the coverage of federal antidiscrimination statutes.

3. Finally, both the AMA and AHA argue (AMA Br. in Opp. 24-26; AHA Br. in Opp. 13-17) that Congress's passage of a provision in the comprehensive Child Abuse Amendments of 1984 that addresses the furnishing of medical care to seriously ill infants (Pub. L. No. 98-457, § 122, 98 Stat. 1752) casts doubt on the validity of the Secretary's regulations under Section 504 and suggests that the Court should deny review in this case. These arguments are without merit.

The relevant provision of the 1984 Amendments requires a state child protective services agency, as a condition to the receipt of federal funds under the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101 *et seq.*), to establish procedures and programs for responding to the reporting of instances of withholding of medically indicated treatment from disabled infants who have life-threatening conditions. See Pet. 26-27 n.22. Those Amendments do not address the distinct duty under federal law of a federally assisted *hospital* to take steps to assure that a handicapped child in its care is not denied needed medical treatment solely because of his handicap. Indeed, Section 127(a) of the 1984 Amendments (98 Stat. 1754) expressly states that "[n]o provision of this Act or any amendment made by this Act is intended to affect any right or protection under section 504 of the Rehabilitation Act of 1973."

Moreover, contrary to the impression sought to be conveyed by the AMA and AHA, the legislative history of the 1984 Amendments does not cast doubt on the Secretary's interpretation of Section 504 or suggest that the protection afforded by Section 504 now is unnecessary. The requirement that a state child protective services agency adopt procedures to respond to instances of the withholding of medical treatment originated in the House bill. See H.R. Rep. 98-159, 98th Cong., 1st Sess. 2, 19 (1983). The report on that bill endorsed the application of Section 504 in this setting. It explained that the state agency's actions were necessary to assure that the child would receive specified treatment, "including services assured under the provisions of section 504 of the Rehabilitation Act of 1973" (H.R. Rep. 98-159, *supra*, at 3), and the bill itself provided that it was not to be construed to "lessen" or "limit" any right or protection under Section 504 (H.R. Rep. 98-159, *supra*, at 27). Similarly, the floor debates on the House bill contain numerous statements that the denial of medical care to handicapped infants in such cases is a form of discrimination, that the bill would reaffirm the civil rights of handicapped children that already were protected by Section 504, and that the bill would build upon and complement

the Secretary's efforts under Section 504.[4] There was, by contrast, no statement by any Member that the Section 504 regulations were beyond the Secretary's authority or would be rendered superfluous if the bill was enacted.

The Senate Report contains a detailed discussion of evidence of the withholding of medical care from severely ill newborn infants. S. Rep. 98-246, 98th Cong., 1st Sess. 5-11 (1983). It observes that the practice "may be more widespread" than indicated by a leading study; cites surveys indicating that a majority of pediatricians would honor a parent's wishes not to treat a newborn child with Down's Syndrome who had an intestinal blockage and would not recommend surgery to the parent; and estimates that 400 infants with spina bifida may be subjected to some form of non-treatment during each year (*id.* at 8-9). The report concludes that if this information is correct, "then federal policy on the civil rights of handicapped persons[] is being contravened." *Id.* at 9. See also *id.* at 11.

The Senate ultimately adopted the language that was enacted by Congress, with minor revisions in conference. The Senators who sponsored the compromise language indicated that they adopted in it a "policy of neutrality" regarding the application of Section 504 and that this intent was reflected in the language of Section 127(a) providing that nothing in the 1984 Act "is intended to affect any right or protection under Section 504" (130 Cong. Rec. S12392 (daily ed. Sept. 28, 1984)). Congress's action therefore does not suggest that Section 504 is inapplicable in this setting or that this Court should decline to resolve that important question.

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[4] 130 Cong. Rec. H379 H380, (daily ed. Feb. 2, 1984) (remarks of Rep. Murphy); *id.* at H381, H382, H384, H385 (remarks of Rep. Erlenborn); *id.* at H388 (remarks of Rep. Biaggi); *id.* at H393 (remarks of Rep. Chandler); *id.* at H395 (remarks of Rep. Hyde); *id.* at H396, H400 (remarks of Rep. Miller); *id.* at H397 (remarks of Rep. Quillen). See also *id.* at H396 (remarks of Rep. Waxman) (supporting proposal, subsequently defeated, to amend House bill; noting that amendment would not affect Section 504 regulations, which must stand or fall on their merits).

From the beginning, the 1984 Amendments were viewed by Congress as a complement to, not a substitute for, whatever protections were afforded to such infants by Section 504. Congress had no occasion to address the distinct duty of a hospital under that Section in legislation that imposed new obligations on child protection agencies. The court of appeals, however, has permanently enjoined the Secretary, on a nationwide basis, from taking any steps under Section 504 to enforce this distinct duty. Especially in view of the importance Congress attached to protection for impaired newborn infants in 1984, the court of appeals' broad ruling warrants review by this Court. The court of appeals' judgment essentially extinguishes any right or protection such infants have under Section 504. Respondents' argument that the Court should deny review of that judgment because of Congress's enactment of the 1984 Amendments is inconsistent with Congress's express statement in Section 127(a) that those Amendments should *not* "affect any right or protection" under Section 504.

For the foregoing reasons and the additional reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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